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IN THE SUPREME COURT OF THE UNITED STATES

July, Special Term, 1942 No. 537028 on. L. L. C.

No._____

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMAN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

United States Ex Rel., Ernest Peter Burger, Et Al., Petitioners for Writs of Certiorari

v.

Brig. Gen. Albert L. Cox, U.S.A., Provost Marshal of the Military District of Washington, Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to bring up to this court this case which is pending in the United States Court of Appeals for the District of Columbia, before judgment is given in that court.

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OPINIONS BELOW

The United States Court of Appeals for the District of Columbia has not yet given its judgment in this case.

The orders of the United States District Court for the District of Columbia have not yet been reported and for convenience a copy is attached hereto, and marked Exhibit I.*

BASIS OF JURISDICTION

Jurisdiction is invoked under section 240 (a) of the Judicial Code, 28 U.S.C., section 347, as amended by the Act of February 13, 1925, 43 Stat. 938. The orders of the United States District Court for the District of Columbia were filed July 28, 1942, and notices of appeal to the United States Court of Appeals for the District of Columbia were filed on July , 1942. It is believed that the

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*Although the petitions of the seven petitioners for writs of habeas corpus were heard together and decided similarly by the District Court, they were not formally consolidated in that Court. As a result, seven orders were entered. Since they are identical except for the names of the respective petitioners, a copy of only one has been attached hereto. After the orders were entered in the District Court, the petitions were consolidated by stipulation of counsel. The petitions are hereafter referred to as comprising a single consolidated case.

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public interest will be served by prompt settlement in this court of the questions involved, and that under its Rule 39 this court may properly assume jurisdiction of this case before judgment is given by the United States Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED

A fundamental question presented in this petition is whether the President of the United States may provide for the trial by military commission of offenses which are (with the exception of the charge of spying covered by Article of War 82) cognizable in the district or other appropriate courts of the United States, at a time when such courts of the United States are open and functioning regularly.

Another fundamental question presented in this petition is whether the President of the United States by proclamation may deny to certain persons, and in particular to the petitioners herein, access to the courts of the United States or of its states, territories and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

A subsidiary question presented is whether the Military Commission may try those of the petitioners herein who are citizens of the German Reich for violations of Article of War 81, which Article of War (in addition to being covered by criminal statutes of the United States) is applicable only to citizens of the United States.

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Another subsidiary question is whether any jurisdiction is conferred upon the Military Commission and whether the order of the President of the United States is in any way validated by Article of War 82 relating to spies, since no evidence was introduced at the hearing before the Military Commission tending to establish certain of the necessary elements of the charge of spying, including the element of intent to communicate military information to any enemy of the United States, and probably including the element of passing through the zone of military operations as that term is defined by military and international law.

Another question is whether any jurisdiction is conferred upon the Military Commission and whether the order of the President of the United States is in any way validated by the laws of war, since no evidence to establish certain of the necessary elements of the charge of spying, including the element of intent to communicate military information to any enemy of the United States, and probably including the element of passing through the zone of military operations as that term is defined by military and international law.

Another question is whether any jurisdiction is conferred upon the Military Commission and whether the order of the President of the United States is in any way validated by the charge of conspiracy, since a charge of conspiracy to commit certain alleged offenses cannot confer jurisdiction upon a tribunal which does not have jurisdiction to try the charges themselves.

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SUMMARY STATEMENT

The essential facts are set out in the petitions filed in the United States District Court for the District of Columbia for writs of habeas corpus.

The petitioners are being detained and imprisoned by color of the authority of the United States in the custody of Brigadier General Albert L. Cox, Provost Marshal of the United States Army, Military District of Washington, at a special section at the District of Columbia jail in the District of Columbia. The causes of such detention and imprisonment are a certain order of the President of the United States, dated July 2, 1942, a copy of which is attached as Exhibit A to the petitions filed in the District Court for writs of habeas corpus; a proclamation of the President of the United States, dated July 2, 1942, a copy of which is attached as Exhibit B to the said petitions; a memorandum or order of the Honorable Francis Biddle, Attorney General of the United States, dated July 3, 1942, a copy of which is attached as Exhibit C to the said petitions; and a certain memorandum or order of Major General Ulio, the Adjutant General, a copy of which is attached as Exhibit D to the said petitions.

Assuming to act in accordance with the orders, memoranda and proclamation aforesaid, the Provost Marshal of the Washington Military District has taken the petitioners into custody and is still detaining them, and Major General Frank R. McCoy, Major General Blanton Winship,

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Major General Walter S. Grant, Major General Lorenzo D. Gasser, Brigadier General Guy Q. Henry, Brigadier General John T. Lewis and Brigadier General John T. Kennedy, assuming to act as a Military Commission, have assumed to conduct a hearing or trial on certain charges or specifications, a copy of which is attached as Exhibit E to the petitions for writs of habeas corpus.

The petitioners filed timely applications in the District Court of the United States for the District of Columbia for leave to file petitions for writs of habeas corpus directed to the aforesaid Brigadier General Albert L. Cox, commanding him to produce them before that court and to do what that court should order concerning their detention and restraint. These applications were denied by a Justice of the District Court of the United States for the District of Columbia in orders dated July 28, 1942. On July , 1942, notices of appeal from the said orders were duly filed by the petitioners in the Court of Appeals for the District of Columbia. By stipulation the applications of the seven petitioners herein were consolidated in that court. No judgment or order has been entered as yet by the Court of Appeals for the District of Columbia in connection with the appeal pending before that court.

REASON FOR GRANTING THE PETITION

These proceedings test the power of the President of the United States to provide for the trial by military commission of offenses cognizable in the courts

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of the United States at a time when those courts are open and functioning regularly and to deny to the petitioners access to those courts. It is believed that the President has no such power, and that all acts purportedly in pursuance of such power are unconstitutional and in conflict with applicable decisions of this court. Upon the decision of the questions raised by this petition depend the civil liberties in wartime of aliens and citizens alike. It is, therefore, urged that this court should take jurisdiction of the case.

It is further urged that this court, as permitted by Section 240 (a) of the Judicial Code, 28 U.S.C., section 347, as amended by the Act of February 13, 1925, 43 Stat. 938, and pursuant to Rule 39 of this court, should bring up this case on a writ of certiorari before judgment is given in the United States Court of Appeals in the District of Columbia, because the public interest will be promoted by prompt settlement in this court of the questions involved.

Wherefore your petitioners pray that a writ of certiorari issue to bring up to this court this case, before judgment is given in the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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Counsel for Petitioners

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Service of a copy of this petition on July 31, 1942, is hereby acknowledged and service of a copy of the record in the courts below is hereby waived. Respondent also waives his right to twenty day's time in which to file a brief in opposition to this petition; and has no objection to the immediate distribution of the papers on this petition to the members of the Supreme Court for action thereon.

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Counsel for Respondent

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EXHIBIT I.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE APPLICATION OF

HERMANN OTTO NEUBAUER,

Petitioner,

FOR A WRIT OF HABEAS CORPUS

O R D E R

The petitioner, Hermann Otto Neubauer, asks leave to file a petition for a writ of habeas corpus by his counsel. It is conceded by petitioner's counsel that petitioner landed on the coast of the United States in June, 1942, from a German submarine, with explosives, which he was instructed by a German officer to use for the purpose of committing sabotage on certain American industries. In view of this statement of fact, it seems clear that the petitioner comes within that category of subjects, citizens or residents of a nation at war with the United States, who, by a proclamation of the President, dated July 2, 1942, are not privileged to seek any remedy or maintain any proceeding in the courts of the United States.

I do not consider that Ex Parte Milligan, 4 Wall. 2, is controlling in the circumstances of this petitioner. The application of the petitioner must, therefore, be denied.

Dated this 28th day of July, 1942.

Justice.

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EXHIBIT I.

"In deference to the Commission and in order that we may not waive for our clients any rights which may belong to them, we desire to state that, in our opinion, the order of the President of the United States creating this Court is invalid and unconstitutional. I do not think it necessary or appropriate to argue that question unless I am so requested.

"It is perhaps sufficient to state that our view is based, first, on the fact that the civil courts are open in the territory in which we are now located and that, in our opinion, there are civil statutes governing the matters to be investigated.

"In the second place, we question the jurisdiction of any court except a civil court over the persons of these defendants.

"In the third place, we think that the order itself violates in several specific particulars congressional enactments as reflected in the Articles of War."